1992

State of Utah v. Robert Todd White : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
ROBERT TODD WHITE,	:	Case No. 920248-CA Priority No. 2
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction for Unlawful Possession of a Controlled Substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hanson, Judge, presiding.

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SUMMARY OF ARGUMENT

The facts of this case support a state constitutional ruling that this Court will review no-knock nighttime search warrants and affidavits without deference to the magistrate, for probable cause.

The no-knock nighttime search warrant issued here allowed this most intrusive and dangerous kind of search of a home occupied by presumably innocent citizens; there were no probable cause suspects listed in the warrant. Particularly because of the dangers posed by no-knock nighttime search warrants, the magistrate should not have issued this warrant, which included an ambiguous description of the place to be searched, did not follow statutory mandates for searches involving no probable cause suspects, and was supported by an inadequate affidavit.

There was no basis for a no-knock search warrant. While the daytime execution of the warrant apparently rendered the improper nighttime authorization harmless in this case, this Court should nonetheless publish an opinion explaining the error, so that

the magistrate will not put citizens and police in unnecessary danger in the future by improperly authorizing nighttime searches.

ARGUMENT

I.
THIS COURT SHOULD NOT DEFER TO THE MAGISTRATE, BUT SHOULD REVIEW THE AFFIDAVIT SEEKING A NO-KNOCK NIGHTTIME SEARCH WARRANT FOR PROBABLE CAUSE.

The State argues that in no-knock nighttime search warrant cases, deference should flow from this Court to the trial court to the magistrate to the police. Respondent's brief at 13-15, 21. This danger posed by such a reversal of constitutional norms[1] is demonstrated by the testimony of the officer who obtained the no-knock nighttime search warrant in this case:

> Last nighttime I did, someone got killed, and he was supposed to be asleep. So you take your best pick. I firmly believe it's safer at night if there's going to be violence.

(T. 29). The fact that the trial court heard this testimony and then explicitly deferred to "police expertise" in affirming the issuance of this improperly issued no-knock nighttime search warrant demonstrates that the judicial actors and police need guidance, not

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1. While it is true that under federal standards, courts defer to magistrates who issue search warrants, no deference is given to trial courts reviewing the issuance of search warrants. E.g. State v. Weaver, 817 P.2d 830 (Utah App. 1991). The idea of deferring to the police who seek the warrants goes against the constitutional doctrine that search warrants are to be evaluated by neutral and detached magistrates, who do not defer to police expertise, but make an independent factual analysis of probable cause for the issuance of the warrant. This neutral and detached magistrate concept is part of federal and state constitutional law. E.g. Allen v. Lindbeck, 93 P.2d 920 (Utah 1939); Illinois v. Gates, 462 U.S. 213, 239 (1983).

deference, from this Court.

It should be noted that the justification that the State presents for deferential appellate review of search warrants differs considerably from the United States Supreme Court's. The reason that the federal review of search warrants is deferential is that the United States Supreme Court is afraid that if reviewing courts enforce the Federal Constitution, the police will be discouraged from seeking warrants altogether. With the "substantial basis" deferential standard of review for search warrants, the Court perversely compromises constitutional standards to encourage police to follow the law. See Illinois v. Gates, 462 U.S. 213, 236 (1983).

In contrast, the State argues,

> [A]ppellate deference is proper, as a matter of respect for magistrates and trial court judges. Those judicial officers, sworn to uphold the federal and state constitutions in a fashion that favors neither the State nor criminal suspects, should be presumed to have done so absent the clearest showing to the contrary.

Brief of respondent at 13.[2]

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2. The State has explored many different justifications for the federal substantial basis test in two other cases, but has not espoused the Supreme Court's position. In State v. Ruiz, Case No. 910514-CA, the State argued that deferential review was appropriate because it would promote consistent results and because the police who execute the warrants place themselves in danger and therefore deserve deference. Ruiz Respondent's brief at at 15-16. In State v. Rosenbaum, the State argued that the deferential substantial basis test was appropriate because magistrates are sworn to uphold the constitutions, because non-deferential appellate review might cause the magistrates to issue the warrants without analysis, because magistrates may be more objective than reviewing courts, because deferential review promotes consistent results, and because non-deferential appellate review is more likely to set guilty defendants free. Rosenbaum Respondent's brief at 13-14.

If the trial courts are deferring to the issuance of the warrants under the Gates analysis, they are not enforcing the constitutions. This Court can determine whether the police, magistrates and trial courts are upholding their constitutional duties by simply reading no-knock nighttime search warrants and affidavits for probable cause, without any presumptions or pretenses.

Because of this Court's ability to publish opinions to guide the lower courts, magistrates, and police in these critical cases, this Court should review no-knock nighttime search warrants without deference to those who have drafted and signed and perhaps read those documents before. Constitution of Utah, Article I section 14.

The State argues that this issue was waived because it was not presented to the trial court by trial counsel. Brief of Respondent at 11-13. The trial court has no authority over this Court's standards of review, and the fact that the trial court did not have the opportunity to address this issue is irrelevant.

II.
THE AFFIDAVIT DOES NOT PROVIDE PROBABLE CAUSE OR A SUBSTANTIAL BASIS FOR THE ISSUANCE OF THE NO-KNOCK NIGHTTIME SEARCH WARRANT.

The State argues that there is no particularity problem with search warrant and affidavit, stating, "Clearly, apartment 3720 was to be searched; apartment 3718 was to be left alone." Brief of respondent at 19. The particularity of the warrant is for this Court decide, by reading, with an eye to the dangers posed by no-knock nighttime searches, the description of the premises to be

searched contained in the warrant and affidavit:

> the premises known as 3720 South 3375 West, the duplex on the west side of the road, 3720 is the southern most half of the duplex, the apartment to the north has the numbers 3718 on the front of the premises, to include all containers, rooms, attics, and basements found therein.

(R. 25).

The State dismisses Mr. White's argument that pursuant to Utah Code Ann. section 77-23-3, the warrant should not have issued unless the magistrate found that the search could not be performed by subpoena, and unless the magistrate tailored the scope of the warrant to protect the rights of the residents of the premises to be searched who were not probable cause suspects. The State does not address the magistrate's failure to tailor the scope of the search, but argues that the subpoena finding required by the statute would have been superfluous, stating,

> Briefly, it seems unlikely that someone suspected of dealing in illicit drugs would comply with a subpoena requiring him or her to surrender evidence of such activity. Indeed, unless such a person were foolish beyond belief, he or she would be expected, upon receiving such a subpoena, to expeditiously conceal or destroy such evidence. Recitation of the likely failure of the subpoena process, then hardly seems necessary in a case like this one.

Respondent's brief at 19.

This argument would best be made to the legislature who enacted section 77-23-3 into law.

The State argument is flawed, in that it assumes that the subpoena would go to a probable cause suspect, who would be unlikely to incriminate himself. The whole point of the statute is that

innocent people may be jeopardized by their proximity to evidence, and should be protected from unnecessary or unreasonable searches and seizures. The warrant in this case authorized a no-knock nighttime search of a residence, without alleging any probable cause suspects. In fact, the two residents listed on utility bills, as indicated in the affidavit, Brian Zeleniak and Cullen McCarty, were not charged. Innocent citizens are unnecessarily put at risk in circumstances such as these, wherein a magistrate rubberstamped a no-knock nighttime search warrant.

While it is true that trial counsel did not address the lack of particularity of the search warrant, Respondent's brief at 18-19, this Court does not review the analysis of trial courts in assessing the issuance of search warrants, but simply reviews the warrants and affidavits. E.g. State v. Weaver, 817 P.2d 830 (Utah App. 1991). The errors are plain on the face of the warrant and affidavit, and in light of the governing law. The particularity errors constitute constitutional violations, and are therefore prejudicial. See State v. Rowe, 196 Utah Adv. Rep. 14, 15 (Utah 1992)(defining constitutional violations as prejudicial). This Court should reach these errors under the plain error doctrine, in the event that traditional waiver doctrines become applicable to review of the issuance of search warrants. See State v. Verde, 770 P.2d 116, 121 (Utah 1989)(plain errors meriting reversal on appeal in the absence of an objection in the trial court are those that are harmful ("there is a reasonable likelihood that the errors affected the outcome"), and should have been obvious to the trial court);

State v. Eldredge, 773 P.2d 29, 35 n.8 (Utah) ("[T]he more harmful an error is, the more likely an appellate court is to conclude that it was objectively obvious, because a high degree of harmfulness might be expected to attract a trial court's attention. On the other hand, in appropriate cases we can exercise our discretion to dispense with the requirement of obviousness so that justice can be done, as when an error not readily apparent to the court or counsel proves harmful in retrospect."), cert. denied, 110 S.Ct. 62 (1989).

In seeking to demonstrate the reliability of the confidential informants in the affidavit, the State argues that the confidential informants should be viewed as reliable citizen informants, speculating that the confidential informants were motivated by love and concern for the spouse who was buying cocaine. Respondent's brief at 17. Such speculation is unfounded in the affidavit. In fact, it appears from the affidavit that the first confidential informant may have been in jeopardy for arranging to distribute a Schedule II controlled substance, a second degree felony. Utah Code Ann. section 58-37-8(1)(a)(ii) and (b)(i). The confidential informants' credibility is hardly buttressed by the fact that the spouse had been arrested for some narcotics charge before, or the detective's observation of what he perceived as drug traffic around the "named premises." An arrest does not indicate guilt, and the suspicious traffic alleged in the affidavit is not tied to either side of the duplex, and is equally consistent with tupperware dealings as with dealings in illegal drugs.

On pages 16 through 17 of the Respondent's brief, the State

argues that because the trial court generously allowed the presentation of evidence at the hearing on the motion to suppress and because the police generously identified the confidential informants, counsel for Mr. White should have presented and examined the confidential informants to demonstrate their unreliability. Respondent's brief at 16-17. The motion to suppress was based on the magistrate's improper issuance of the no-knock nighttime search warrant (R. 21-23). Presentation and examination of evidence in addition to the search warrant and affidavit was therefore unnecessary. E.g., Gates, supra. While the prosecutor did not object to the unnecessary testimony of Detective McCarthy, this did not create a burden for Mr. White to present additional irrelevant witnesses.

The State argues in summary in point one of its brief that the totality of the circumstances provide a substantial basis for the magistrate's issuance of the search warrant. Respondent's brief at 19-20. What the State fails to address in this summary is that the magistrate issued a no-knock nighttime search warrant to search a residence that was ambiguously described in the warrant, and apparently occupied by innocent citizens. The affidavit failed to protect the constitutional and statutory rights of these citizens, or to establish the reliability of the confidential informants, who had never witnessed any drug transactions in the residence. If these factors are properly overlooked under the deferential "substantial basis" test, this is further reason for this Court to reject the federal standard and rule under Article I section 14 of

the Utah Constitution that in reviewing no-knock nighttime search warrants, this Court will review without deference for probable cause.

III.
THE MAGISTRATE SHOULD NOT HAVE AUTHORIZED A NO-KNOCK NIGHTTIME SEARCH.

The State argues that no-knock authorizations should not have to meet the probable cause standard, but should be issued with deference to the police requesting the authorizations, if the officers present "some evidence" justifying the authorizations. Respondent's brief at 20-22.

The State and Federal Constitutions both explicitly require reasonable searches and probable cause for all search warrants. Because no-knock searches are more intrusive, more dangerous and more prone to constitutional unreasonableness than other searches, the constitutions and logic compel as a minimum a showing of probable cause to justify no-knock search warrants, and certainly do not tolerate the miniscule "some evidence" standard proposed by the State. See generally Lafave, Search and Seizure, §§4.7 and 4.8 at pages 260, 263-276, 270-280, 287-290; supplement, §4.8 at 49-54.

The case the State cites in support of its "some evidence" standard is inapposite. In Dalia v. United States, 441 U.S. 238 (1979), cited in respondent's brief at 21, the Court held, in pertinent part, that the Fourth Amendment did not require courts issuing wiretap orders under federal law to explicitly authorize covert entry for installation of the wiretap equipment. Id. at

257-259. Dalia's holding does not support the argument that magistrates should defer to the police in no-knock nighttime search warrant cases, because the facts at issue in wiretapping are different from the facts at issue in no-knock nighttime cases. Covert entry is essential to any successful wiretap and would necessarily be considered by a judge issuing a wiretap order, and covert entry does not pose the dangers that inhere in no-knock nighttime searches. See LaFave, Search and Seizure, supplement §4.8 at 53-54.

The State also argues that Mr. White failed to present evidence for an adequate consideration of the reasonableness of the no-knock search. Respondent's brief at 24-25. Again, Mr. White was not moving to suppress the evidence on the basis of an unreasonable search; he was moving to suppress the evidence because the no-knock nighttime search was not supported by probable cause (R. 21-23). Mr. White had no burden to present evidence relating to the reasonableness of the search, for he was raising a separate constitutional issue. See e.g. Utah Constitution Article I section 14 (requiring both reasonable searches and the proper issuance of warrants); United States Constitution, Amendment IV (same); State v. Ayala, 762 P.2d 1107, 1109 (Utah App. 1988)(defendant challenged search warrant for lack of probable cause established in the supporting affidavit, and the reasonableness of the search of his person).

The State concedes that because the Detective McCarthy's affidavit did not seek narcotics, but only packaging materials and

other proof a "a major sales operation," the no-knock issuance cannot be supported by the theory that the authorization was necessary to prevent the destruction of evidence. Respondent's brief at 23-24. Apparently, the State is conceding that the search warrant affidavit incorrectly indicated that "the property sought may be quickly destroyed, disposed of, or secreted." (R. 34). The magistrate signed off on this warrant, and the trial court affirmed the issuance of the warrant on the basis that cocaine, which was not sought in the affidavit, is readily destructible (T. 67). Again, the facts of this case demonstrate that the police, magistrates, and trial courts need guidance, not deference, from this Court.

The State argues that the no-knock authorization was justified by Detective McCarthy's personal feeling that no-knock searches are always safer in drug cases. Respondent's brief at 22. While it is true that Utah's appellate courts have recognized that narcotics dealers are frequently armed, id., innocent people are frequently armed in this State with the broadest state constitutional right to keep and bear arms in the nation. See reply brief of appellant in State v. Archambeau, Case no. 900564-CA.

The State's argument overlooks the fact that Utah and Federal Constitutional law require magistrates to evaluate the issuance of warrants on the basis of actual facts from which the magistrates can draw their own conclusions. Allen v. Lindbeck, Gates, supra.

The State characterizes as "slender" the dangers posed by the vague threats from the alleged cocaine dealers to the spouse,

and from the spouse to the confidential informant, but cites State v. Roybal, 716 P.2d 291 (Utah 1986), for the proposition that the detective's no-knock authorization request was reasonable and sufficient to justify the no-knock authorization. Respondent's brief at 23. The Roybal case is inapposite because it involved a Terry frisk, rather than the issuance of a warrant, and involved a much heavier, much more specific and more imminent danger to the officer than is reflected in this affidavit. Compare the White Affidavit at 31 ("CI told your affiant that the CI has been threatened by the spouse if the CI came forward to the police with the information provided. Further the CI was told by the spouse that the supplier of the cocaine has threatened the spouse when the spouse has been late in repaying for cocaine that was received by the spouse.) with Roybal at 292 (Officer responded to residence at 2:00 a.m. to investigate family fight, where shots were fired, defendant was arrested and later frisked on the street by police who thought he was still in custody; gun from fight was never recovered and defendant appeared to be hiding something when he was frisked).

Generalized stereotypical suspicions such are alleged in this affidavit are insufficient to justify breaking into this residence. Utah Code Ann. section 77-23-10.

The State is persuasive in its argument that the daytime execution of this search warrant rendered harmless the erroneous nighttime authorization. Respondent's brief at 25-27. However, the magistrate who signed this warrant must be informed for safety's sake that the legislature's prerequisites to the issuance of

no-knock nighttime search warrants are law which the magistrate must follow. This Court should publish an opinion to this effect.

CONCLUSION

This Court should reverse the trial court's denial of Mr. White's motion to suppress and remand this case to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 17 day of Nov., 1992.

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ELIZABETH HOLBROOK
Attorney for Mr. White

CERTIFICATE OF MAILING

I, Elizabeth Holbrook, hereby certify that I have caused to be served eight copies of the foregoing to the Utah Court of Appeals and four copies of the foregoing to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 17 day of Nov., 1992.

ELIZABETH HOLBROOK

DELIVERED by _____ this _____ day of Nov., 1992.

_____